

# EPA OCR's

# Misguidance Document

COMMENTS SUBMITTED BY  
MOTHERS ORGANIZED TO STOP ENVIRONMENTAL SINS  
(M.O.S.E.S.)

REGARDING USEPA OCR'S

*Draft Revised Guidance for Investigating Title VI Administrative Complaints*

*Challenging Permits*

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Mothers Organized to Stop Environmental Sins (M.O.S.E.S.) in its analysis of the *Draft Revised Guidance for Investigating Title VI Administrative Complaints*

*Challenging Permits* has reached the key conclusions that:

***EPA, because of conflicts and a demonstrated lack of political will to enforce Title VI, made apparent by this Guidance, lacks the capability of properly enforcing Title VI and another agency or mechanism for enforcement must be sought.***

### **Introduction: Guidance ignores OCR's terrible track record**

The *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (the "Guidance") pretends like the last eight years of non-action by USEPA's Office of Civil Rights to enforce civil rights did not happen. It seems as though EPA assumes that citizens, who have been denied their civil rights, are going to go along with this pretense as silently and compliantly as lambs. The Guidance should open with a forthright apology from the Office of Civil Rights (OCR) for what has been a highly egregious delay in administering justice. Meanwhile thousands, if not millions of American citizens, have lost their civil rights due to actions by federally assisted government agencies and programs. EPA's abandonment and utter neglect of their duties in enforcing Title VI of the Civil Rights Act, has had a serious negative impact on people's lives, denying them basic civil rights granted under the law. We do not have to look at communist regimes for human rights violations. We have them right here at home.

Further, this revised Guidance is a bit like closing the door after the horse is out of the barn. The focus of the Guidance is on handling new complaints. It does not address

the obvious fact that some Title VI complaints have been sitting at EPA for many years. The Guidance does not address how EPA will efficiently manage this incredible backlog. “Justice delayed is justice denied.” The Guidance, with its focus on timetables for new complaints, fails completely to address issues unique to the complaints that have been collecting dust for years. What time frame is OCR going to apply to these complaints that have already languished for years?

It is much more difficult to measure the disparate impacts from a facility that now is in closure, as in Winona, but for fifteen long and terrible years caused adverse disparate impacts on the surrounding community with a black population three times the state average. The facility remained in operation and civil rights violations continued for years after the M.O.S.E.S. complaint was filed with USEPA OCR. The harm already done to citizens’ health, lives, and civil rights due to the failure of the Texas Natural Resource Conservation Commission (TNRCC) to properly enforce basic environmental laws is, of course, far from moot.

### **Specific Comments**

#### **Guidance contains no credible threat to state agencies that violate civil rights**

There are some items in the Draft Guidance which are particularly disturbing from the perspective of the citizen’s of Winona.

Overall, the Guidance conveys the message that state agencies will *never* actually be taken to task for violating Title VI. The Guidance contains no credible threat to state agencies for violating citizen’s civil rights. These violations, in environmental justice circumstances, could pose life threatening or adverse health impacts, birth defects,

property devaluation and literally drive poor people into poverty. These agencies can read this Guidance and breathe a sigh of relief, as there is every form of “out” and loophole for these violating agencies. EPA OCR’s Guidance makes it plain that not even a slap on the wrist or harsh word will be forthcoming from them. USEPA’s OCR is not going to touch environmental injustice because it is a political hot potato and they do not know what to do with it. As a result it is being swept under the rug and its existence denied.

If OCR should ever pick up the Title VI complaints that it has neglected or abandoned, the process outlined in the Guidance, will never result in an actual enforcement action against an agency which has violated citizens’ civil rights. Besides a cumbersome health-based method for determining an adverse disparate impact, the Guidance includes, among other things, opportunities for alleged “informal resolution,” “mitigation,” and “justification.” In addition, the Guidance provides an appeals process that is *exclusive* to the recipient state agencies (those accused of violating people’s civil rights) denying American citizens equal rights to due process. Since when does the accused receive preferential treatment over the victim? The involved appeal process could well drag on for years more. If, inconceivably, EPA ever reached the point where it decided to withdraw state agency funds, it would sometimes not even be done within the lifetime of the facility or its victims, as has already happened in Winona. From its actions and the language of the Guidance, it appears that EPA designed it that way. EPA appears content to stand back and let the harm happen to people’s health and civil rights.

### **Justification Loophole**

Regarding justification, the Guidance document states that:

OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important and integral to the recipient's mission.

§ VII. A. 1. It would not take much imagination on the part of a state agency's legal counsel to come up with a justification based on "economic development" for any violation of Title VI. Considering EPA's lack of political will in enforcing Title VI, it is our concern that EPA will accept literally any justification that a state agency can make sound half-way credible. The alleged safeguards that the economic benefit is delivered "directly to the affected population" is dangerously vague, and makes no difference when the adverse health impacts are also being delivered "directly" to the community. *Any* project can be characterized as "important and integral to the recipient's mission." Justification is simply a gaping loophole, through which any violating agency can escape, with EPA's assistance.

### **Mitigation Loophole**

The Guidance further states that:

Practicable mitigation measures associated with the permitting action could be considered as less discriminatory alternatives, including in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts.

§ VII. A. 2. Mitigation, first of all, does not address the issue of accidents and upsets that happen frequently after a permit has been issued, nor the many other means by which the presence of these polluting facilities profoundly affect the lives of people in communities of color. Secondly, mitigation appears to be an open invitation for an agency to make a token effort by requiring some mitigation efforts, but essentially making a "Gentleman's

Agreement,” thereby allowing for adverse disparate impacts to continue. “Less discriminatory alternatives” means that discrimination will continue, and when that discrimination involves an actual threat to the health and lives of citizens, this concept is utterly unacceptable in a civilized and moral society.

### **Informal Resolution Loophole**

The Guidance states also that:

complainants *may* play an important role in the informal resolution process . . . *OCR may seek to informally resolve the complaint directly with the recipient.* In those situations, the complainant’s role is determined by the nature and circumstances of the claims.

And further states:

OCR may also consult with complainants, although their consent is not necessary.

It is particularly disturbing that OCR would contemplate cutting citizens out of negotiations all together—especially considering how far trust has eroded in EPA OCR’s ability to enforce civil rights at all. Leaving citizens out is not acceptable. A provision of this sort is against the principles of open government, anti-democratic and most certainly anti-community. It goes against the policy of public participation, which EPA trumpets so frequently, but fails to deliver itself. Invariably, this will result in back room deals of which citizens would never be made aware. This is an invitation for states to approach OCR with secret deals that may be rife with civil rights violations, finding acceptance by EPA because they appear to lessen the violations. EPA perpetuates business as usual with this Guidance. It sounds, by this provision, like OCR finds the process of democracy too messy and burdensome. When citizens are excluded from the resolution, it is virtually a

100 % guarantee of disastrous results and bigger and further problems that will not go away.

OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding. However, it is OCR's responsibility to ensure that the interests of the Federal government are served and no violations of Title VI or EPA's implementing regulations exist in a recipient's programs or activities.

§ IV. A. 2. M.O.S.E.S. does not find credible OCR's assurances that in these deals, which cut out citizen involvement, that "no violations of Title VI" will exist. First, informal resolution may not be possible, as civil rights cannot be negotiated. EPA knows that citizens would find the continued adverse disparate impacts under an informal resolution unacceptable and thus EPA seeks to exclude the citizens. Second, even if an informal resolution could be reached, inclusion of affected citizens is the *only* means by which the process could result in no violations of Title VI. This even is unsure because the unequal bargaining power between the two sides could still result in an agreement where serious Title VI violations would still occur.

Particularly suspect is the statement that "during the informal resolution process, recipients can propose broader measures that are outside those matters ordinarily considered in permitting process." § IV. A. 2. The Guidance gives the example where the recipient would require a facility that emits lead to lower some of their lead emissions, and perhaps also require other facilities in the area to lower lead emissions. This obviously still would not account for the additional lead, so the Guidance also suggests a "household lead abatement program." This virtually guarantees a disparate impact on certain individuals, which Title VI forbids. For example, if a child lives near the facility that will be emitting more lead, that child is in a toxic hot spot and reductions

in lead from facilities further away would not decrease exposure from the facility nearby which poses a much higher risk. The facility next door to the child would definitely increase the child's exposure to lead emissions. This child may live in housing that has no lead problems and thus a household lead abatement program would be useless for reducing that child's lead exposure. These "broader measures" may appear fair on paper, yet can result in serious harm to health and a violation of civil rights in reality.

### **Voluntary Compliance Loophole**

The Guidance also contains the very sweeping provision:

OCR expects to explore a range of possible options to achieve voluntary compliance . . . the approaches explored may be assessed with respect to implementation considerations such as cost and technical feasibility.

§ VII. A. 3. "Voluntary compliance" typically lacks any safeguards to assure that the provisions are enforced or adequate—especially when "cost and technical feasibility" are the bottom line. This is not to forget politics as usual. A provision like this is so broad—"OCR expects to explore a range of possible options to achieve voluntary compliance"--it could mean just about anything OCR wants it to mean and it serves as an open invitation to state agencies to discriminate as business as usual might dictate. The real bottom line is that compliance with our civil rights laws is not voluntary—they are mandatory, albeit not enforced by the EPA. The violator must realize that compliance is not an option and that noncompliance will be swiftly and severely dealt with. That is simply not the case with this Guidance.



### **Severely Narrowed Scope of Enforcement Loophole**

Another reason there is no credible threat of enforcement for civil rights violations by the state agencies is that a great number of real violations have been excluded. Economic, social and cultural impacts are not addressed. It begs the question—if EPA OCR is not going to address these obvious infringements on civil rights, which often are the direct result of an environmental permit, what agency is? The simple answer, which OCR and the state agencies already know is, “none.” Title VI authorizes enforcement against these violations as does EPA’s regulations. The Guidance, however, states:

In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient’s authority to consider, as defined by applicable laws and regulations.

§ VI. B. 2. a. It is only this Guidance, and not Title VI or EPA regulations, which unjustifiably narrows the scope of Title VI to only those impacts allegedly “within the recipient’s authority.” It may be true under environmental statutes that the agency cannot recognize certain impacts, but Title VI does not put EPA in that box. EPA has put itself in that box. EPA is actually narrowing Title VI in such a way that EPA violates Title VI, itself. Despite EPA’s argument to the contrary, in practical terms, EPA is an agency that receives federal tax dollars, and thus in a legitimate reading of Title VI, EPA itself would be a violator.

Property values in Winona were impacted by the presence of a hazardous waste facility. The county lowered tax assessments of surrounding properties based specifically

on the impact of underground injections migrating beneath the property. Any Guidance must clearly state that OCR is to consider all impacts arising from a permitted facility.

### **Litigation Loophole**

Another loophole for state agencies is OCR's decision not to conduct a civil rights investigation during the pendency of litigation. The Guidance states:

If the complainant seeks to pursue a Title VI complaint with OCR on issues that are the subject of ongoing Federal or state court litigation, the complaint should be re-filed within a reasonable time period, generally no more than 60 calendar days after the conclusion of the litigation.

§ III. B. 3. b. Though the Guidance refers to staying investigations during litigation regarding discrimination, OCR has communicated to M.O.S.E.S. that it did not want to take action on the M.O.S.E.S. complaint pending tort litigation against the hazardous waste facility in Winona by surrounding residents. Discrimination was not the subject of this law suit.

Litigation, as in Winona, may be tort litigation against a company, and not related to the permitting or enforcement done by the state agency, and yet OCR can, and indeed has in the case of Winona, used this as an excuse not to take any action. This in itself constitutes a civil rights violations. Tort litigation often goes on for many years. There is no excuse for OCR to allow civil rights violations to continue for years because of litigation. There will often be litigation, and this is just another way states may avoid ever being held accountable.

### **Impossible Standards Loophole**

Another reason state agencies will not see any credible threat of enforcement from this Guidance, is that the standards for proving a disparate impact—Direct link to

impacts, Risk, Toxicity-weighted emissions and Concentration levels §VI.B.3--are beyond the capacity of a poor community of color to demonstrate. State agencies, on the other hand, will always have the technical expertise to submit reports and analysis to show that none of the standards for a disparate adverse impact are met. The emphasis on these types of scientific analysis tips the scales greatly to the advantage of the state agencies.

In one standard, EPA calls for a direct link between stressor and adverse health outcome. Even well bank rolled personal injury firms are challenged to meet this standard in a personal injury suit, especially in Texas. OCR acknowledges the difficulty in obtaining this data, however, as far as affected communities are concerned, the data necessary for the other standards is just as impossible to produce. As a result, state agencies will always submit an analysis which show no adverse disparate impact (and this analysis will be given “due weight”), whereas only under the rarest circumstances will citizens be able to submit their own report or rebut a state agency’s self-serving analysis. The bottom line is, any type of additional exposure to toxic substances *is* an impact. EPA should focus on simple exposure to pollution, not only on health outcomes or impossibly complex risk analyses.

### **The “no Guidance” Loophole**

This Guidance also states that “enforcement-related matters and public participation, will be addressed in future internal EPA guidance documents as appropriate.” That future date may never arrive, just as justice has not. It seems that any complaints alleging a failure to enforce will be kept forever on hold. These are cases where the agency is more directly implicated in the violation of Title VI. However, the

agencies can see they have nothing to fear, as there is not even a Guidance to deal with enforcement issues.<sup>1</sup>

### **The Appeals Only for Recipients Loophole**

All of the above mentioned points pale in comparison to the fact that under this Guidance, without good reason, recipient state agencies are granted appeal rights and the citizens who actually brought the complaint are denied. OCR explains:

The investigation of Title VI complaints does not involve an adversarial process between the complainant and the recipient. . . . because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA's Title VI regulatory process.

§ II. B. 2. Whether or not OCR believes denying appeal rights to citizens is justified, the practical result is that they have handed victory over to state agencies in every instance. This schizophrenic policy denies one party appeal rights under the rationale that this is not an adversarial process, yet allows an appeal to the civil rights violator under the same rationale. This most surely violates Title VI. Though EPA claims that, as a federal agency it does not come under Title VI, MOSES believes that this may well prove to be incorrect in a court of law. This treatment is highly discriminatory.

It appears that there is more than one reason why the Guidance contains no credible threat of enforcement against state agencies violating Title VI.

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<sup>1</sup> The Guidance states that, "Until that time, such allegations will be addressed under the regulations." This is rather vague. Will none of this Guidance be used in enforcement cases? It appears that portions probably will be used. In all reality it will be used to not address the enforcement cases, which are some of the tougher cases. These involve operating facilities and thus there could be serious consequences to industry and a state agency.

### **Guidance viewed in political context—the big guns win**

First, in regards to the initial Guidance issued over two years ago, state agencies and industry essentially paired up together, and expended considerable resources on attacking the first Guidance document. Industry exerted enormous pressure through certain Republican members of Congress, and nearly succeeded in cutting off funding to OCR to handle Title VI complaints. The citizens' response, on the other hand, has been primarily from isolated groups and networks, and some members of Congress that have come to their aid. This Guidance appears to be an exact reflection of the difference in political power between the two sides. The Guidance has been pushed so far in favor of state agencies and industry that even someone unfamiliar with the issue in viewing this document for the first time, would be astonished at the inequities.

### **EPA too interdependent on state agencies to credibly enforce Title VI**

Second, EPA's relationship is too interdependent on the state agencies to reliably enforce Title VI, which means withdrawing funding. EPA, as decision maker has an inherent conflict of interest. Representatives of MOSES have been present at meetings where EPA has stated it doesn't have the manpower or inclination to take over state jobs. Relationships between many state agencies and EPA are already seriously strained, and this would be the final straw. EPA is thus put in a position where it is virtually impossible, despite statements to the contrary, to pull the plug on state agencies and state agencies know it. As a result they have little or no motivation for complying with Title VI.

States, of course, make loud noises about their commitment to civil rights. It will take a *powerful* and truly impartial federal agency to bring these states around to real compliance with Title VI. This Guidance makes it clear that EPA is not that agency. Serious discrimination by agencies does happen—the United States Department of Agriculture has had to publicly admit the problems with discrimination within their agency as a result of a lawsuit by black farmers. *There is nothing so unique about state environmental agencies that they are above racial discrimination.* State environmental agencies are typically controlled by larger political forces within their state government. Only a vigilantly enforced Civil Rights Act will provide assurance that citizens of color will not be discriminated against by these agencies.

**EPA needs to create an enforcement mechanism that really holds state's feet to the fire**

Communities, such as Winona, that have suffered adverse disparate impacts, demand to see that this does not continue to happen to other communities. For this to happen there must be a great price to pay when civil rights are violated. State agencies must be held accountable. *This Guidance document must be scrapped and replaced with a process that contains a clear and credible threat to state agencies that have violated Title VI.*

**Civil rights violations will only stop when filing of a Title VI complaint stays the issuance of a permit**

The Guidance states flatly that, “Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue.” § V. E. The fact that this profoundly important provision, which is at the core of why EPA’s Title VI

policy has failed, contains no discussion, speaks volumes. If a Title VI complaint accepted for investigation did indeed stay the permit at issue, then both industry and state agencies would be exceedingly careful to avoid a Title VI complaint and take all the proper steps to avoid it. Without any harsh consequence, discrimination simply continues as the status quo.

The fact that construction and operation of a facility is not affected by the filing of a Title VI complaint, makes the process meaningless as disparate impacts are allowed to occur for the entire period during which the investigation is conducted. In Winona, our investigation has not begun even after 6 years . In Winona, disparate impacts continued for years after the filing of the complaint. Disparate impacts have continued since 1992 at a facility in Michigan where the first complaint was filed. The neglect works to the clear and obvious benefit of industry and state agencies which violate citizens' civil rights.

Harmful violations of Title VI are assured under this procedure, especially where enforcement rather than permitting is at issue. Since there is no compensation to the affected community under this process, there is also no compensation for the community that suffered for *additional* years under this process. In practical reality, a 180 day resolution will not happen under this Guidance unless massive changes in staffing occur at EPA. It will take more than extra staff, however; it will take genuine political will by the EPA to do justice and enforce against civil rights violations.

## **Communities lack resources to engage in a fair Alternative Dispute Resolution process**

The Guidance promotes the use of Alternative Dispute Resolution (ADR), but does not address the obvious fact that in ADR the parties would have an enormously uneven bargaining position in terms of data, financial resources, and expertise, among other things. Affected citizens lack resources for ADR and often lack basic negotiation skills. Communities need resources for an equal process. Some investigation by USEPA needs to be done to assist communities with critical data with which they can come to the table. Most importantly, there needs to be a strong message from USEPA to the state agency accused of violating Title VI that swift and severe enforcement is likely, and that ADR is one last opportunity for the state agency to resolve the matter. Only under these circumstances would the agencies have any interest in settling. The state agency must realistically see the prospect of a much greater loss before they would reach any meaningful settlement with the communities.

As citizens get nothing directly from the Title VI process, it is an all or nothing deal for a community, and thus citizens are likely to accept a highly deficient offer because it is their only chance to get anything. USEPA or the mediator needs to have some control over this process to avoid totally deficient offers being made to communities that may accept the offer out of desperation.

The state agency can take the position in ADR that because they have data analysis and experts and the poor citizens of color do not, that they, the agency, are correct and the community is not. The fact that communities may lack data and have to



rely greatly on oral testimony (in instances where disparate impacts are already occurring) does not make the state right and the citizens wrong simply because the difference in resources effect the degree to which a citizen complaint can be verified. “Due weight” needs to be given to citizens’ first hand testimony regarding the impact of a permitted facility or facilities on their health and life. Though a different form of evidence from that suggested in the Guidance, citizen testimony, especially when many citizens report the same impacts, has a high degree of credibility and reliability. This is the type of evidence commonly relied upon by judges and juries in making important decisions in civil trials of all sizes and scope.

If OCR is going to promote ADR with these obvious imbalances they must take large practical steps to create some balance. EPA, on its part must be willing to sponsor the community with a sizable grant so that a community can afford the services of legal and scientific experts to guide them through process. A grant would still, no doubt be cheaper than the type of highly complex modeling that EPA proposes doing. Thus far, EPA has been willing to give grant money to recipients accused of violating civil rights in the Title VI context, but complainants have been neglected in this regard.

The Guidance states, “To the extent resources are available, EPA expects to provide support for efforts at informal resolution.” This, as we have learned, excludes any direct support for citizens.

### **Due weight**

EPA, in the Guidance, claims:

EPA believes that it can, under certain circumstances, recognize the results of such analyses and give them appropriate due weight.

§ V. B. 1 M.O.S.E.S. does not believe that EPA, despite its criteria, will be able to determine biases which can be part of any analysis and are invariably going to be part of any analysis submitted by a state agency to defend the agency's decision. Virtually all of these studies, which EPA suggest they will grant "due weight," will be submitted by state agencies. Thus EPA indicates a preference for evidence, that in most cases only one side will be able to submit, and that side can and will control what they submit. There is thus an automatic bias for recipients built into the investigation process by the "due weight" provision of the Guidance.

The allowance of "due weight" to information that meets certain criteria outlined in the Guidance seems highly ironic in light of the Select Steel decision. If anything, after that decision, OCR should be bending over backwards to assure citizens that their information and evidence will be given "due weight."

In these analyses by agencies, there is not just science, but politics at play. OCR could safely rely on a state agency's analysis, giving it "due weight" and claim it was relying on science, when in fact it is relying on politics and business as usual.

## **Conclusion**

There is nothing in this system to hold EPA accountable to the citizens whose civil rights they are charged with protecting. Recipients are given every conceivable chance at informal resolution, mitigation, and even justification. EPA clearly never wants to ever arrive at the end of the road where they must take action.

EPA is being held accountable to state agencies and industry. This Guidance is a product of that accountability. Companies will not be hesitant to locate in communities of color and states will not be hesitant to permit a facility in a neighborhood of color under this Guidance. The message to state agencies and industry is—you can proceed with business as usual without any problem.

### **No light at the end of the tunnel**

*The Guidance further highlights that EPA is not the right agency to handle Title VI complaints.* EPA is in an awkward position, as EPA is not willing to take back delegated programs, and does not wish to strain established relationships with states. EPA has a conflict of interest.

This Guidance is prime evidence that EPA will not enforce Title VI. EPA lacks the political will. This policy has been apparent in EPA's behavior for years. It clearly goes to a lack of will within the agency. When OCR desired to make a decision favoring industry and a state agency for apparent political reasons, it did so with great expediency. OCR, however, has no intention of enforcing Title VI against a state agency, expediently or otherwise. Now the draft Guidance has forced EPA to put its intentions into words. Even a casual examination of the Guidance makes it apparent that EPA OCR, despite its claims to the contrary, has no intention of enforcing Title VI now or ever.

## **ADDENDUM**

The following comments were given on behalf of M.O.S.E.S. during the listening session held by EPA in San Antonio, Texas on August 24, 2000.

### **Comments at Aug. 24, 2000 EPA Listening Session on Draft Revised Investigation Guidance. Prepared by MKS.**

My name is Mary Sahs. I represent Mothers Organized to Stop Environmental Sins or MOSES. The purpose of Title VI and the regulations promulgated under Title VI is to use the threat of withdrawal of federal funds to force a state or local government to rectify discriminatory practices, including those that cause disparate impacts based on race, color or national origin. Despite the best motives, EPA has created a review process for Title VI complaints that (1) is impossible to implement and (2) would never result in a finding of noncompliance.

It appears that the Guidance is a result of EPA's attempt to appease all stakeholders and EPA's inability to think outside the "scientific" box that guides most of its programs and policies. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process.

My main point is that determining the existence of discrimination is not a scientific inquiry. By imposing standard environmental regulatory scientific thinking to such a determination, EPA has created a program that is impossible to implement. I have not taken an active part in the environmental justice debate leading up to development of this Guidance. I was asked to represent MOSES tonight so I began reading the draft. Clearly enormous thought and resources went into drafting this document. EPA appears to have listened and heard the comments of various stakeholders, particularly in response to the fallout from the Select Steel decision. Several times, I stopped my reading to note that certain aspects of the analysis sounded thorough and even-handed. But at some point I became so overwhelmed that I had to stop and laugh. Despite any good intentions, EPA has created a monster. I have practiced in the environmental law field for nearly twenty

years and it is clear to me that EPA could never implement the scientific review system it has outlined in the Guidance.

In addition, by imposing standard environmental regulatory scientific thinking to determining whether discrimination exists, EPA has created a program that would never result in a finding of noncompliance. Let's consider for a moment the Impact Assessment – whether the activities of the permitted entity, either alone or in combination with other sources, may result in an adverse impact.

First, the science and the data do not exist to perform the analysis proposed by EPA. Second, even if the science and data did exist, such an analysis could never be completed within the time frames allowed by law. Third, even if the science and data exist and the analysis is completed on time, the political fall out from such a finding-for any community-would be horrendous. For example, let's assume the EPA performs its analysis and finds a significant adverse impact for a particular community. Then it fails to find a significant disparate impact. Isn't it the case that EPA has then concluded that a community, of whatever race and ethnic background, is being significantly adversely impacted, but because there is no disparate impact based on race or ethnicity, nothing needs to be done? The adverse impact analysis in itself is a political timebomb, which will give EPA even a further disincentive to find adverse impacts.

EPA writes that it is not requiring or expecting the local and state governments to address social and economic issues they are not prepared to address., neither of which limits impacts solely to health impacts. But wait. We need to look at this again. This Guidance epitomizes the old adage “You can't see the forest for the trees.” EPA and needs to step back and see the forest. The forest of discrimination is a social and economic issue, not a scientific issue. Once EPA defines the issue and analyzes it in scientific terms it becomes unworkable and meaningless, despite the best intentions of all concerned.

Discrimination cannot be analyzed or addressed scientifically. No thinking person can dispute the fact that the bulk of polluting, industrial facilities in our nation have been located in communities of color and low income communities. That is the forest. No thinking person can dispute the fact that polluting, industrial facilities adversely affect the communities in which they are located, either through adverse health effects or quality of life effects. That is the forest. The federal government has expressed its desire to address this disparate impact but what EPA has devised is a method to look at each individual tree.

Even if EPA could implement this Guidance, it would never find noncompliance. The bar is too high. The analysis is too complex. The exceptions are too broad. Thus, at the end of the day, after enormous commitment of time and resources, EPA would conclude that the forest does not exist; communities of color do not host most industrial, polluting facilities. The scientific paradigm does not work in analyzing and addressing the pervasive sociological and economic problem of disparate impact caused by environmental permitting decisions made at the state and local levels.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, I believe that EPA should scrap the current Guidance and begin again.